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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN NAVARRO MORELOS, Defendant and Appellant.	F068407 (Super. Ct. No. F05906459-3) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Jon N. Kapetan, Judge.

Eduardo A. Paredes for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

Appellant Martin Navarro Morelos appeals from an order denying his Penal Code section 1016.5[1] motion to vacate his 2005 judgment of conviction in Fresno County Superior Court case No. F05906459-3 on one count of lewd and lascivious conduct with a child under the age of 14 (§ 288, subd. (a)). Morelos contends the court erred in denying his motion because neither the trial court nor his counsel advised him that his removal from the United States was a definite consequence of his plea. We affirm the trial court's order denying Morelos's motion to vacate the judgment.

FACTS

On September 27, 2005, Morelos pled no contest to lewd and lascivious conduct with a child under the age of 14 (§ 288, subd. (a)). Prior to entering his plea, Morelos filled out and signed a change of plea form. He also initialed a paragraph that stated, "If I am not a citizen, my change of plea can result in deportation, exclusion from admission to the United States, and/or a denial of naturalization. Deportation may be mandatory for the above offenses. I have fully discussed this matter with my attorney and understand the serious immigration consequences of my plea." Morelos's defense counsel signed an acknowledgement on the form that he explained to Morelos each of his rights, answered all of his questions, and explained the consequences of his plea. Additionally, an interpreter signed an acknowledgement on the form that she translated the form to Spanish for Morelos and that Morelos indicated he understood the contents of the form and initialed it. After he filled out the form, the court asked Morelos if he initialed and signed the form and whether he completely understood everything written in the parts of the form he initialed. Morelos answered affirmatively to each question.

On January 4, 2006, Morelos was placed on probation for five years on the condition that he serve 151 days in local custody.

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[1] All further statutory references are to the Penal Code.

On June 12, 2013, Morelos filed a motion pursuant to section 1016.5 to vacate his conviction and to dismiss and set aside the criminal complaint. The motion alleged Morelos was a lawful permanent resident of the United States in 2005 when he entered his plea, that he was ordered removed from the United States on December 4, 2006, and that his conviction was an aggravated felony under immigration law that made him ineligible for any relief in the immigration court. The motion, however, did not allege that Morelos would not have entered his plea and would have proceeded to trial had he known that deportation was a definite consequence of his plea. Nor did Morelos attach any declarations or other evidence to establish that he suffered negative immigration consequences as a result of his plea or that he would have taken his case to trial had he been properly advised.

On September 19, 2013, during the hearing on the motion, defense counsel conceded that "the only evidence of prejudice would be that Mr. Morelos is under fugitive status and that he is not allowed to come to the United States even though he is married here in the United States, [to a] citizen." Counsel also told the court that in a declaration attached to a previous motion to vacate his conviction,[2] Morelos stated had he known he was going to be permanently excluded from the United States he would have taken the risk and gone to trial. However, he did not provide the court with a copy of that declaration. After hearing further argument, the court denied the motion to vacate.

DISCUSSION

Morelos contends the court abused its discretion in denying his motion to vacate because during the September 27, 2005 change of plea proceedings, neither the court nor defense counsel advised him that removal from the United States was a definite consequence of his plea.

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[2] The record indicates that on November 12, 2010, Morelos filed a motion to vacate his 2005 conviction alleging errors in establishing a factual basis for his plea. The trial court denied the motion and on appeal this court upheld the order.

"[Penal Code] section 1016.5, subdivision (a), requires that a trial court, prior to accepting a defendant's plea of guilty or nolo contendere to an offense punishable as a crime under California law, advise the defendant that: 'If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.' Subdivision (b) of section 1016.5 provides in pertinent part: 'If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. *Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement*.'" (*People v. Dubon* (2001) 90 Cal.App.4th 944, 951.)

"To prevail on a motion brought pursuant to Penal Code section 1016.5, a defendant must establish: (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement, i.e., if properly advised, he or she would not have pleaded guilty or nolo contendere." (*People v. Dubon*, *supra*, 90 Cal.App.4th at pp. 951-952.)

"Our state Supreme Court has held a validly executed waiver form is a proper substitute for verbal admonishment by the trial court. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286.) Particularly, in *Ibarra*, the court addressed constitutionally mandated advisements required under *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122. It also stated in *Ibarra*: 'A sufficient waiver form can be a great aid to a defendant in outlining [a defendant's] rights. The defense attorney, who is already subject to a duty to explain the constitutional rights outlined in a proper waiver form to his client prior to the client's entering a plea, may even find it desirable to refer to such a form. Thus, a defendant who has signed a waiver form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge. The judge need only determine whether defendant had read and understood the contents of the form, and had discussed them with his attorney.'" (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-522.)

Here, Morelos executed a change of plea form and on that form he initialed a paragraph that advised him of the three immigration consequences of his plea the court was required to advise him of pursuant to section 1016.5. An interpreter signed an acknowledgement on the form stating that she translated the form to Spanish for Morelos and Morelos acknowledged that he understood its contents. Additionally, Morelos's attorney signed an acknowledgement stating that he explained the consequences of Morelos's plea to him. Afterwards, in response to questioning by the court, Morelos acknowledged that he signed the form and understood everything that was stated in the paragraphs he initialed, which included the paragraph explaining the immigration consequences of Morelos's plea. Thus, the record establishes that the court complied with its duty, pursuant to section 1016.5 of advising Morelos of these consequences.

Further, Morelos did not allege or provide any evidence to prove there existed more than a remote possibility that the conviction would have one or more of the immigration consequences specified in section 1016.5. Nor did he allege or provide any evidence to prove he would not have entered his plea and instead would have gone to trial had he been properly advised. Morelos's attorney alluded to a declaration that was attached to a prior motion to vacate in which Morelos asserted that he was prejudiced because he would not have accepted a plea deal and would have gone to trial had he been properly advised. That declaration, however, was not before the court. Thus, the record shows that Morelos failed to satisfy any of the three requirements necessary to obtain relief pursuant to section 1016.5.

In *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), the United States Supreme Court explained a defense counsel's duty with respect to advising a defendant of the immigration consequences of his plea:

> "Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the

> deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward … a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear*." (*Padilla, supra,* 559 U.S. at p. 369, fn. omitted, italics added.)

Morelos relies on *Padilla* to contend that because his plea made exclusion from the United States a certainty, the advisement given to him in the trial court did not meet the requirements of *Padilla*. Morelos is wrong.

Padilla addressed a defendant's right to counsel and imposed on counsel a duty to give correct advice when the deportation consequence of a defendant's plea is "truly clear." (*Padilla, supra,* 559 U.S. at p. 369.) It did not, as Morelos contends, expand the court's responsibilities pursuant to section 1016.5 to include a similar duty.

And, as explained in *People v. Aguilar* (2014) 227 Cal.App.4th 60:

> "[Penal Code] section 1016.5 addresses only the duty of trial courts to advise the defendant of the immigration consequences of the plea, and it empowers the court to vacate a conviction and set aside a plea only for the *court's* failure to fulfill that duty. It does not address any duty that defense counsel may have to provide such advice, nor does it empower the court to vacate a conviction or set aside a plea for counsel's failure to fulfill his or her duty in that regard. For that reason, section 1016.5 does not provide the trial court with jurisdiction to address a claim that a defendant was deprived of the effective assistance of counsel by counsel's failure to fully advise him or her of the immigration consequences of a guilty plea." (*People v. Aguilar, supra,* 227 Cal.App.4th at p. 71.)

In any event, even if the trial court's advisement of immigration consequences was inadequate under *Padilla*, Morelos would not be entitled to have his plea vacated because, as noted earlier, he also failed to satisfy the second and third requirements for obtaining such relief. Thus, we conclude that the court did not abuse its discretion when it denied his motion to vacate his plea.

DISPOSITION

The order denying Morelos's motion to vacate his September 27, 2005 conviction in Fresno County Superior Court case No. F05906459-3 is affirmed.